LIBRARY
SUPREME COURT

Office Supreme Court, U.S.
FILED
AUG 19 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 387

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*,

vs.

FEDERAL POWER COMMISSION, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WILLIAM J. GROVE
CARROLL L. GILLIAM
Dow, Lohnes and Albertson
600 Munsey Building
Washington 4, D. C.
Attorneys for Petitioner

Of Counsel:
W. W. HEARD
J. P. HAMMOND
Wm. H. EMERSON
P. O. Box 591
Tulsa, Oklahoma

August, 1963

WAYNE R. SCOTT CO. — LAW BRIEF PRINTING — 507 S. QUAKER, LUther 7-2052 — TULSA, OKLA.

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	3
Statement	3
Reasons For Granting the Writ	9
1. The Decision of the Court of Appeals Prevents Broad Application of the Doctrine of This Court's Decisions Respecting Jurisdiction to Review Regulatory Orders.	9
2. The Decision of the Court of Appeals Constitutes an Unwarranted Denial of Expeditious Judicial Review to the Detriment of the Courts, Gas Consumers, and the Gas Industry.	12
3. The Commission Interpretation of Section 19(b) of the Act prevents Court of Appeals Review on the Record Made in Proceedings in Which Substantive General Orders Are Issued.	14
4. The Court of Appeals Decision Leaves Unsettled Long-Standing Uncertainties and Conflicts Respecting Jurisdiction to Review Commission Orders.	16
Conclusion	19

Appendix:

Opinion of the Court of Appeals for the Tenth Circuit	1a
Pertinent Excerpts From Natural Gas Act	19a
Pertinent Excerpts From Commission Regulations	25a
Order No. 242, 27 F.R. 1356, 27 FPC 339.	28a
Letter Order issued February 19, 1963, Docket No. CI63-867	32a

CITATIONS

Cases: Page

Amerada Petroleum Corp., et al. Dockets No. CI62-1544, *et al.*, 29 FPC , January 30, 1963 18

Burlington Truck Lines, Inc., et al. v. *United States, et al.*, 371 U.S. 156 (1962) 16

Columbia Broadcasting System, Inc. v. *United States*, 316 U.S. 407 (1942) 3, 6, 7, 8, 9, 13, 18

Cities Service Gas Co. v. *FPC*, 255 F. 2d 860 (10th Cir. 1958) *cert. den. sub. nom. Magnolia Petroleum Co.* v. *Cities Service Gas Co.*, 358 U.S. 837 7

FCC v. *American Broadcasting Co., Inc.*, 347 U.S. 284 (1954) 3, 6, 9, 13

Florida Line and Avocado Growers, Inc., et al. v. Paul, et al., 373 U.S. 132 (1963) 16

FPC v. *Panhandle Eastern Pipe Line Co., et al.*, 337 U.S. 498 (1949) 9

Frozen Food Express v. *United States*, 351 U.S. 40 (1956) 6, 9, 13

Pan American Petroleum Corp. v. *FPC*, Case No. 7303, 10th Cir. Decided May 20, 1963 4, 9, 11, 14

Phillips Petroleum Co. v. *FPC*, 227 F. 2d 470 (10th Cir. 1955) *cert. den. sub. nom. Michigan Wisconsin Pipe Line Co.* v. *Phillips Petroleum Co., et al.*, 350 U.S. 1005 7

Public Service Comm. v. *FPC*, 284 F. 2d 200 (D. C. Cir. 1960) 16

Sohio Petroleum Co. v. *FPC*, 298 F. 2d 465 (10th Cir. 1961) 16

Southwestern Electric Power Co. v. *FPC*, 304 F. 2d 29 (5th Cir. 1962) *cert. den.* 371 U.S. 924 16

Texaco Inc. v. *FPC*, 290 F. 2d 149 (5th Cir. 1961) 16

Texaco Inc. v. *FPC*, Case No. 7217, 10th Cir. Decided May 20, 1963 9

The Pure Oil Co. v. *FPC*, 292 F. 2d 350 (7th Cir. 1961) 16

United Gas Pipe Line Co. v. *FPC*, 181 F. 2d 796 (D. C. Cir. 1950) *cert. den.* 340 U.S. 827 7

United Gas Pipe Line Co. v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958) 4

Page

United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) 4

United States v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) 3, 7, 8, 9, 13

Wisconsin, et al. v. *FPC, et al.*, 373 U.S. 294 (1963) 17

Wisconsin v. *FPC*, 303 F. 2d 380 (D. C. Cir. 1961) affd. 373 U.S. 294 17

Texts:

Administrative Law Treatise, Kenneth C. Davis (1958) Sec. 21.06-21.08 11

Statutes:

Natural Gas Act, 15 U.S.C. 717c(c), (d) and (e), 717d(a) 717f(c) and (e), and 717r(b):

Section 4 17

Section 4(c) 2, 3, 10

Section 4(d) 2, 3, 4, 10

Section 4(e) 2, 3, 4, 8, 10

Section 5(a) 2, 3, 4, 8

Section 7(c) 2, 3, 17

Section 7(e) 2, 3, 8, 10, 17

Section 19(b) 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2112 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*,

vs.

FEDERAL POWER COMMISSION, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in *Pan American Petroleum Corp. v. FPC*, Case No. 7002, on May 20, 1963.

OPINION BELOW

The opinion of the Court of Appeals is printed in the Appendix hereto, pp. 1a-18a, and is reported in 317 F. 2d 796. The portion of the decision below to which this petition pertains, Case No. 7002 in the Court of Appeals, is at pp. 8a-10a in the Appendix, and reported in 317 F. 2d 802-803.

JURISDICTION

The judgment of the Court of Appeals was made and entered on May 20, 1963. The jurisdiction of this Court is invoked

under 28 U.S.C. Section 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b). The jurisdiction of the Court of Appeals under Section 19(b) of the Natural Gas Act to review Federal Power Commission substantive regulations is the issue in this case.

QUESTION PRESENTED

By its rulemaking "general" Order No. 242 the Federal Power Commission requires its Secretary to *reject* and *disallow* without a hearing producer rate filings under Section 4(c) and (d) of the Natural Gas Act and certificate applications under Section 7(c) of the Act which are supported by sales contracts containing flexible price changing clauses.

It is well settled that orders which *reject* rate filings under Sections 4(c) and (d) of the Act or which *disallow* rates after hearing and findings under Section 4(e) or 5(a) of the Act are substantive orders reviewable under Section 19(b) of the Act. Similarly, orders issued upon hearing and findings under Sections 7(c) and (e) of the Act which deny or condition certificates are substantive orders reviewable under Section 19(b) of the Act. These orders are reviewable in *direct* review upon the record made in the proceedings in which they were issued.

However, the Court of Appeals held that, because Order No. 242 is in the *form* of a substantive regulation, it is an exception to this well settled rule and not *directly* reviewable upon the record made in the proceeding in which it was issued. The question here presented is:

> Whether final and controlling substantive rate and certificate adjudications and decisions are reviewable under Section 19(b) of the Act on direct appeal in the proceeding in which they are made, where, as is the case with Order No. 242, such final decisions are in the form of rulemaking orders directed to Petitioner as a member of the class, regulated independent producers, rather than in the

form of "special" orders directed to Petitioner singly or as a member of a large group of individually named producers.

STATUTES INVOLVED

The statutory provisions involved are Sections 4(c), (d) and (e), 5(a), 7(c) and (e) and 19(b) of the Natural Gas Act, 52 Stat. 822 and 823 (1938), 56 Stat. 83-84 (1942), and 52 Stat. 831 (1938), 15 U.S.C. 717c(c), (d) and (e), 717d(a), 717f(c) and (e), and 717r(b). They are set out in the Appendix, pp. 19a-24a.

STATEMENT

This case presents for review the basic question: Whether the "substantive effect test" of aggrievement and reviewability applied by this Court to determine reviewability of agency regulations is a rule of general applicability that is applicable to judicial review under Section 19(b) of the Natural Gas Act. As a result of its misinterpretation and erroneously restrictive application of the reviewability doctrine of *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407 (1942), *FCC v. American Broadcasting Co., Inc.*, 347 U.S. 284 (1954), and *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), the Court of Appeals held that the "substantive effect tests" of parties aggrieved and reviewability of orders that was applied in these cases is not applicable to judicial review under Section 19(b) of the Natural Gas Act. The result is that aggrievement, and therefore Section 19(b) reviewability, are governed by the technical *form of orders* rather than the *substantive effect of Commission decisions*. This case thus presents an issue respecting uniform interpretation of the aggrievement requirement for judicial review and a basic question respecting the administration of the Natural Gas Act that is unresolved by this Court.

[1] "The particular label placed upon [its action] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive." *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 416 (1942).

The subject matter of jurisdiction under Section 19(b) of the Act in this case is *Order No. 242*, 27 F.R. 1356, 27 FPC 339, February 8, 1962 (R. 277-279; J.A. 52-56, App. 28a-31a), amending *Order No. 232-A*, 26 F.R. 2850, 25 FPC 609, March 31, 1961, which amended *Order No. 232*, 26 F.R. 1983, 25 FPC 379, March 3, 1962. Order No. 242 requires rejection of rate filings without a hearing, adjudication or findings showing whether the rates are just and reasonable, and rejection of certificate applications without a hearing, adjudication and findings of public convenience and necessity, where the sales contract contains a flexible price changing clause. This series of orders summarily invalidates the flexible price changing provisions in Petitioner's sales contracts, such as provisions that, at the end of the twentieth year of gas deliveries, the parties will redetermine the contract price to reflect the then current market price, which provisions the Commission designates as "indefinite" price changing provisions.[2]

Under doctrine of *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958), orders which deprive Petitioner of its contractual right to file rates and require rejection of rate filings have the same substantive effect as orders disallowing rates after hearing under Section 4(e) or 5(a) of the Act. In these cases the Court held that the two requirements of gas seller initiated rate changes are (1) a contractual right to the rate change and (2) filing under Section 4(d) of the Act a notice of the rate change.

[2] See *Pan American Petroleum Corp. v. FPC*, Case No. 7303, 10th Circuit (App. 1a-18a). Other invalidated contract provisions are price renegotiation provisions, market price provisions and favored-nation provisions. These flexible price changing provisions are designated "indefinite" price changing provisions in Commission orders and in the opinion below. They allow price flexibility under long-term contracts by allowing Petitioner to change its contract prices to reflect current market conditions and prices. Throughout this petition, Petitioner refers to these clauses as flexible price changing provisions.

The proceedings which ultimately resulted in Order No. 232 were instituted by notice issued April 4, 1956, in Docket No. R-153, proposing issuance of regulations requiring summary rejection of initial rate schedule filings supported by producer gas sales contracts containing flexible change in price provisions. Petitioner, then Stanolind Oil and Gas Company, filed its May 24, 1956, letter opposing the proposed rule. There were no further proceedings until March 3, 1961, when the Commission issued Order No. 232 (25 FPC 379) determining that flexible change in price provisions in all independent producer contracts *tendered for filing* on and after April 3, 1961, are *inoperative* and of *no effect at law*. On March 20, 1961, Petitioner filed its views and comments in opposition to Order No. 232, and on March 28, 1961, it filed its application for rehearing. By Order No. 232-A (25 FPC 609) issued March 31, 1961, the Commission amended Order No. 232 to make it applicable only to producer contracts *executed* on or after April 3, 1961. On April 26, 1961, Petitioner filed its application for rehearing on Order No. 232-A. By Letter Orders issued May 4, 1961, and May 5, 1961, the Commission rejected Petitioner's applications for rehearing on the ground that "application for rehearing [upon these orders] does not lie under Section 19 of the Natural Gas Act."

Thereafter, by Notice of Proposed Rulemaking, issued October 10, 1961, in Docket No. R-203 (R. 1-3, J.A. 26-28), the Commission proposed amending Order No. 232-A to require summary *rejection of producer rate schedules and certificate applications* which are supported by contracts containing flexible change in price provisions. In its views and comments, Petitioner maintained that the proposed amendatory order would be even more unlawful and in excess of the Commission's authority than Order No. 232, as amended by Order No. 232-A[3] (R. 12-66).

On February 8, 1962, the Commission issued Order No.

[3] Extensive views and comments were filed by local gas distributing companies, interstate pipe line companies, state public service commissions and independent producers (R. 4-250).

242 (R. 277-279, J.A. 52-56, App. 28a-31a) which (1) requires *rejection of all producer rate schedules and applications for certificates of public convenience and necessity* which are supported by contracts executed on or after April 2, 1962, that contain flexible change in price provisions and (2) provides that, with respect to pipeline certificate applications, *such contracts will not be considered in support of the pipeline company's gas supply*. Thereafter, on March 7, 1962, Petitioner filed its application for rehearing (R. 290-318, J.A. 56-85), and on April 1, 1962, its application for rehearing was denied (R. 388-389, J.A. 109-111). On April 19, 1962, Petitioner filed its petition for judicial review of Order No. 242 (J.A. 2-15). The Commission moved to dismiss asserting that Order No. 242 is not *directly* reviewable, regardless of whether it is procedural or substantive in effect, and regardless of the substantive sanctions imposed upon Petitioner thereby, and regardless of the substantive rate and certificate adjudications and decisions embodied therein.

The local issue was Court of Appeals jurisdiction under the first sentence of Section 19(b) of the Act: "Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States . . . by filing in such court . . . a written petition praying that the order of the Commission be modified or set aside in whole or in part." Petitioner maintained that Order No. 242 is *directly* reviewable *because of what it does*. The Commission maintained that Order No. 242 is not directly reviewable *because of what its form is*.

In support of its argument that Section 19(b) of the Act provides that all decisions fixing substantive rights are *directly* reviewable regardless of whether issued in the *form* of general regulations or specific orders, Petitioner relied on the broad doctrine applied by this Court in *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407 (1942), *FCC v. American Broadcasting Co., Inc.*, 347 U.S. 284 (1954), *Frozen Food Express v.*

United States, 351 U.S. 40 (1956) and *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), to determine whether the substantive general regulations before it were *directly* reviewable.[4] Petitioner argued that the reviewability doctrines applied by this Court in these cases are applicable to Section 19(b) of the Act with the result that the label and technical *form* of Order No. 242 is irrelevant, but that reviewability is determined by its practical *substantive effect*. cf. "The particular label placed upon [its action] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive." *Columbia Broadcasting System, Inc. v. United States*, supra.

The Commission argued that because it is in the *form* of a regulation, Order No. 242 is not *directly* reviewable under Section 19(b) of the Act even if it constitutes final substantive adjudication, that aggrieves Petitioner. It sought to distinguish Order No. 242 from substantive orders which it admits are reviewable in that Order No. 242 is in the *form* of a regulation directed to Petitioner as a member of the whole body of regulated independent producers rather than in the *form* of a special order directed to Petitioner in its corporate name. It relied principally upon *United Gas Pipe Line Co. v. FPC*, 181 F. 2d 796

[4] In these cases, the Court reviewed general regulations and policy statements issued by the Federal Communications Commission and the Interstate Commerce Commission. The *Columbia Broadcasting* case was brought in the District Court under 47 U.S.C. § 402(a) and 28 U.S.C. § 47. The *American Broadcasting* case was brought in the District Court under 47 U.S.C. § 402(a), 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325, and 5 U.S.C. § 1009. The *Frozen Food* case was brought in the District Court under 49 U.S.C. § 305(g), 28 U.S.C. §§ 1336, 1398 and 2321-2325, and 5 U.S.C. § 1009. The *Storer Broadcasting* case was brought in the Court of Appeals under 47 U.S.C. § 402(a), 5 U.S.C. §§ 1009 and 1034. Petitioner also relied on Court of Appeals decisions under Section 19(b) of the Act sustaining review of substantive Commission decisions made under Section 4 of the Act. Cf. *Cities Service Gas Co. v. FPC*, 255 F. 2d 860 (10th Cir. 1958), *cert. den. sub. nom. Magnolia Petroleum Co. v. Cities Service Gas Co.*, 358 U.S. 837, and *Phillips Petroleum Co. v. FPC*, 227 F. 2d 470 (10th Cir. 1955), *cert. den. sub nom. Michigan Wisconsin Pipe Line Co. v. Phillips Petroleum Co., et al.*, 350 U.S. 1005.

(D. C. Cir. 1950), *cert. den.* 340 U.S. 827, in which the Court held that the general regulation before it was not *directly* reviewable because (1) the certified record did not furnish an intelligible basis for judicial review, (2) the effect of the regulation was not apparent on its face, and (3) the regulation was not an assertion of authority under one of the many sections of the Act which specifically require a hearing such as Sections 4(c), 5(a), or 7(e).

The Court below granted the Commission motion to dismiss. However, the Court said that expeditious direct review of substantive regulations such as Order No. 242 would aid in the administration of the Act.[5] Petitioner submits that the Court of Appeals erred by extending to review of *substantive* regulations the rule of decisions involving purely *procedural* regulations, and erred by sustaining the Commission argument that aggrievement and reviewability depend on the *form* of orders rather than on the *controlling substantive effect* of the Commission adjudications of rights. The Court of Appeals did not apply the *Columbia Broadcasting System, Inc. v. United States*, supra, and *United States v. Storer Broadcasting Co.*, supra, "substantive effect" reviewability doctrine that substantive regulations directly aggrieve individual members of the class to which they are addressed and are *directly* reviewable. The basic error in the court below is its decision that the "substantive effect" test applied in these cases is not applicable to review of Order No. 242 under Section 19(b) of the Act.

In two companion cases decided in the same opinion as the

[5] The Court also held that Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009, is inapplicable to review of Commission orders, but that review of such orders is governed entirely by Section 19(b) of the Natural Gas Act (App. 9a). However, Commission's argument for dismissal was based in part upon its claim that where the remedy under Section 19(b) of the Act is not adequate, Commission orders are reviewable in actions to enjoin enforcement thereof.
Prior to the Orders No. 232, 232-A and 242 cases, court decisions involving reviewability of Commission "general" orders dealt with orders which the courts found to be procedural.

instant case (*Texaco Inc. v. FPC*, Case No. 7217, and *Pan American Petroleum Corp. v. FPC*, Case No. 7303), the Court of Appeals held that Commission Order No. 232, as amended by Order No. 232-A, and subsequently by Order No. 242, is invalid and void as being contrary to and in violation of the hearing and review regulatory scheme prescribed in Sections 4, 5 and 7 of the Act.[6] The Court held that the Commission does not have authority to legislate in what it conceives to be the public interest, but that it is entirely a creature of the Natural Gas Act, and the determining question is what the Act allows. Cf. *FPC v. Panhandle Eastern Pipe Line Co., et al.*, 337 U.S. 498 (1949); *FCC v. American Broadcasting Co., Inc.*, 347 U.S. 284 (1954).

Petitioner understands the Commission is filing petitions for writ of certiorari in *Texaco Inc. v. FPC*, Case No. 7217, and *Pan American Petroleum Corp. v. FPC*, Case No. 7303. In view of the fact that the Court of Appeals decisions in the instant case and in Cases No. 7217 and 7303 are interrelated and involve the same Commission orders, it is respectfully submitted that consideration of the petitions for writ of certiorari in all three cases will be facilitated if all three of the petitions are considered together.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals prevents broad application of the doctrine of this Court's decisions respecting jurisdiction to review regulatory orders.

The Court of Appeals held that the "substantive effect test" enunciated in *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407 (1942); *FCC v. American Broadcasting Co., Inc.*, 347 U.S. 284 (1954), *Frozen Food Express v. United States*, 351 U.S. 40 (1956), and *United States v. Storer Broadcasting*

[6] Review in these two cases was under the Commission's construction of Section 19(b) of the Act, and the Court did not have before it the record upon which Orders No. 232, 232-A and 242 were issued.

Co., 351 U.S. 192 (1956),[1] does not govern jurisdiction under Section 19(b) of the Natural Gas Act to review substantive regulations such as Order No. 242. In so holding, the Court of Appeals misinterpreted and unduly restricted application of the broad doctrine of these cases. Its decision is inconsistent with uniform application of this Court's broad test of parties aggrieved and reviewability of regulatory orders and constitutes a serious hindrance to effective administration of Section 19(b) of the Act.

Order No. 242 (R. 277-279, J.A. 52-56, App. 25a-31a) operates directly against Petitioner (1) by requiring summary rejection of its rate filings under Sections 4(c) and (d) of the Act and its certificate applications under Section 7(c) of the Act, which are supported by gas sales contracts containing flexible pricing clauses, and (2) by depriving Petitioner of an adjudicatory hearing and findings under Sections 4(e) and 7(e) of the Act, 18 C.F.R. § 154.93 and 157.25 (App. 25a-27a). Order No. 242 operates indirectly against Petitioner by providing that its contracts containing "indefinite" pricing clauses are not evidence of gas reserves in support of pipeline company certificate applications, 18 C.F.R. § 157.14(a) (10) (v) (App. 26a).

The Court of Appeals held that, because the "substantive effect test" of reviewability is not applicable to review of natural gas orders, Petitioner is not a party aggrieved by final rate and certificate adjudications that are in the *form* of substantive regulations such as Order No. 242 and may not have *direct* review of Order No. 242 on the record in the proceedings in which it was issued. It held that the Order

[1] In these cases, the Court reviewed general regulations and policy statements issued by the Federal Communications Commission and the Interstate Commerce Commission. The *Columbia Broadcasting* case was brought in the District Court under 47 U.S.C. § 402(a) and 28 U.S.C. § 47. The *American Broadcasting* case was brought in the District Court under 47 U.S.C. § 402(a), 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325, and 5 U.S.C. § 1009. The *Frozen Food* case was brought in the District Court under 49 U.S.C. § 305(g), 28 U.S.C. §§ 1336, 1398 and 2321-2325, and 5 U.S.C. § 1009. The *Storer Broadcasting* case was brought in the Court of Appeals under 47 U.S.C. § 402(a), 5 U.S.C. § 1009 and 1034.

No. 242 adjudication of substantive rights is reviewable only *indirectly* on review of orders in a *form* directed to Petitioner in its corporate name and naming a specific sale, *Pan American Petroleum Corp. v. FPC*, Case No. 7303 (App.. 1a-18a). The doctrine of the "substantive effect test" in this Court's decisions is that reviewability is determined by whether the regulation is controlling so as to require Petitioner or the Commission to take or refrain from taking specific future action. Order No. 242 is *directly* reviewable under this test. It requires the Commission Secretary to *reject summarily* without a hearing, all initial rate filings and certificate applications respecting post April 1, 1962 contracts in which Petitioner includes flexible price changing provisions. It therefore controls Petitioner by requiring it to refrain from including flexible price changing clauses in its contracts.

This Court has reiterated the delays, uncertainties and vexatious litigation that arise from failures to apply the "substantive effect test."[4] However, the Court of Appeals found that this Court has not specifically decided that this reviewability test is to be broadly applied so as to be applicable to judicial review under Section 19(b) of the Natural Gas Act. Unless this Court reverses the decision below, the Commission will continue to insist that the "controlling substantive effect test" does not govern review of natural gas orders.

There is nothing unique about the Section 19(b) provision that "Any party to a proceeding under this act aggrieved by an order . . . issued in such proceeding may obtain review of such order in the circuit court of appeals of the United States . . . by filing in such court . . . a written petition praying that the order of the Commission be modified or set aside in whole or in part." However, the Commission insists that reviewability depends on the technical *form of orders* instead of the *substantive effect of decisions*. Commission insistence that decisions of this Court respecting well settled canons of judicial review are not applicable to

[4] *Administrative Law Treatise*, Kenneth C. Davis (1958), Sections 21.06-21.08.

Section 19(b) of the Act has resulted in unwarranted and expensive denials of expeditious judicial review, in depriving courts of an opportunity to review substantive regulations upon the record in the proceedings in which they are issued, in unwary persons forfeiting their right to judicial review, and in a flood of litigation by persons seeking to protect themselves against inadvertent forfeitures of judicial review.

2. The decision of the Court of Appeals constitutes an unwarranted denial of expeditious judicial review to the detriment of the courts, gas consumers, and the gas industry.

Four obviously unfavorable consequences of the Court of Appeals decision that Section 19(b) of the Act does not permit *direct review* of Order No. 242 are (1) it requires the Court of Appeals to review Order No. 242 without reviewing the record upon which it was issued, (2) it deprives producers of rights under the Act,[8] (3) it tends to cause confusion and uncertainty respecting the administration of the Act, and (4) it increases the cost of natural gas to the consuming public by increasing the cost of producer and pipeline company operations.

Under the Commission argument in support of *indirect* review, review of Order No. 242 must be accompanied by a one to three year period of enforced idleness for one of Petitioner's gas reserves and a one to three year delay in construction of the pipeline project dependent thereon. Delivery of gas and construction of the interdependent pipeline project must be delayed during the period necessary for Petitioner to negotiate a contract violating Order No. 242, prepare and file a futile certificate application, and obtain from the Commission Secretary a form rejection letter (App. 32a). In addition, the gas field and pipeline construction project must remain idle and unavailable for public service during the period of judicial review so, the case

[8] Even though Orders Nos. 232, 232-A and 242 are invalid and void, in Dockets Nos. G-7526, G-7490, G-12273, G-12363 and G-15380, Petitioner has been forced in 7 emergency situations to conform its contracts, rate filings and certificate applications thereto.

will not become moot. The cost of maintaining shut-in gas fields is a cost to Petitioner that must ultimately be paid by natural gas consumers. In the present inflationary period, postponements of pipeline construction projects unavoidably result in increased costs of construction which ultimately are paid by natural gas consumers.

If this Court's "substantive effect test" is applied to review under Section 19(b) of the Act, substantive general orders are *directly* reviewable, and, upon appropriate motion, the Court of Appeals or the Commission may order the effect thereof stayed pending final decision on review. Judicial review can then proceed without being accompanied by shut-in gas reserves and idle pipeline construction projects.[18]

As is hereafter shown, no benefits to the reviewing court, to the Commission, to the consuming public or to Petitioner result from prohibiting expeditious *direct* review and requiring *delayed indirect* review. Delays in concluding review of substantive regulations are productive of periods of uncertainty and confusion respecting the administration of the Act. Gas consumers, pipeline companies, and producers cannot plan future operations with confidence while important adjudicatory decisions of wide applicability involving important substantive rights are shrouded in uncertainty and confusion because the validity of such decisions is unresolved. In the *Columbia Broadcasting, American Broadcasting, Frozen Food* and *Storer Broadcasting* cases, supra, this Court found that such uncertainty producing delay is unwarranted where, as here, a final adjudication of substantive rights is involved.

[18]The fact that, until stayed or declared invalid, Order No. 242 requires Petitioner either to waive substantive rights by modifying its contracts, rate filings and certificate applications to comply therewith or to keep its gas fields shut in shows that Order No. 242 is a final Section 4 and 7 adjudication of substantive rights and the cases cited by the Commission below are not applicable. The orders involved in the pre-Order No. 242 cases cited by the Commission below did not require anyone to make the choice between waiver of substantive rights and keeping gas fields shut in.

Delays in judicial review are prescribed and tolerated only where necessary to enable the agency to make its final ruling and to provide the court with an adequate record for judicial review. In the instant case, the Commission made its final ruling when it issued Order No. 242, and the delays successfully interposed by the Commission actually deprived the Court of an adequate record.

3. The Commission interpretation of Section 19(b) of the Act prevents Court of Appeals review on the record made in proceedings in which substantive general orders are issued.

The Commission argued that its interpretation of Section 19(b) of the Act would result in the Court of Appeals having a more adequate record upon which to review Order No. 242. However, it had exactly the opposite effect. It deprived the Court of Appeals of an opportunity to review Order No. 242 upon the record in the rulemaking proceeding in which it was issued.[11] The record that the Commission argued should be the basis for review of Order No. 242 consists of the Commission Secretary's form rejection letter (App. 32a) and Petitioner's application for certificate of public convenience and necessity. Obviously, and in a companion case[12] the Court of Appeals so found, these documents do not shed any light upon the basis for Order No. 242.

Section 19(b) of the Act provides that "the Commission shall file with the Court [of Appeals] the record upon which the order complained of was entered," and that "upon the filing of the record" the Court's jurisdiction "shall be exclusive, to affirm, modify, or set aside such order in whole or in part." The

[11]The certified transcript of record in Docket No. R-203 comprises 389 pages. The Commission has never certified a transcript of record in Docket No. R-153. In *Pan American Petroleum Corp.* v. *FPC*, Case No. 7303 (App. 1a-18a), the Commission did not certify to the Court a record in either Docket No. R-203 or Docket No. R-153.

[12]*Pan American Petroleum Corp.* v. *FPC*, Case No. 7303, 10th Circuit (App. 1a-18a).

well settled rule of construction is that statutes are to be construed as a whole. The Commission interpretation of the first sentence of Section 19(b), prescribing the review jurisdiction of the Court of Appeals,[13] conflicts with the clear meaning of the provision requiring certification of the record. However, the jurisdictional sentence of Section 19(b) is consistent with the provision requiring certification of the record. The Court of Appeals has jurisdiction to review Order No. 242 in this case where Section 19(b) requires the Commission to certify the record upon which Order No. 242 was issued.

The Court of Appeals decision respecting Section 19(b) of the Act also conflicts with Section 2112, Title 28, United States Code, in that Section 2112 specifically provides that judicial review of regulatory agency orders requires certification of the record made in the proceeding in which the order being reviewed was issued. Section 2112 is clearly applicable to judicial review under Section 19(b) of the Natural Gas Act.

Application of the decision below to review of other substantive regulations may result in burdening the Court of Appeals and this Court with unnecessary litigation. Under Petitioner's interpretation of Section 19(b) of the Act and 28 U.S.C. § 2112, judicial review of Order No. 242 consists of review of the record in the proceedings in which it was issued; and the court in which the Commission first certifies the record acquires *exclusive* jurisdiction to review Order No. 242. Under the decision below, the record in the Order No. 242 proceedings is never certified to any court, and no court ever acquires exclusive jurisdiction to review Order No. 242. This could result in eleven separate judicial reviews of a substantive regulations such as Order No. 242 (one in each of the 11 circuits), and conflicts between the circuits. In

[13] Section 19(b) "Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain review of such order in the circuit court of appeals of the United States . . . by filing in such court . . . a written petition praying that the order of the Commission be modified or set aside in whole or in part."

turn, this could result in the filing of petitions for writ of certiorari seeking to resolve this unnecessary conflict.

In two recent cases, *Burlington Truck Lines, Inc., et al. v. United States, et al.*, 371 U.S. 156 (1962), and *Florida Line and Avocado Growers, Inc., et al. v. Paul, et al.*, 373 U.S. 132 (1963), the Court reiterated the well settled rule that judicial review means review of the record made in the proceeding in which the decision complained of was made. The reviewing court can then determine whether the agency decision is supported by law and has substantial basis in fact. Review under Section 19(b) of the Act is not an exception to this rule, but follows the well settled rules of judicial review stated in this Court's opinions. However, until this Court specifically so holds, it will continue to be subject to petitions for writ of certiorari filed because of conflicting decisions in the Court of Appeals respecting the validity of the same Commission order.

4. The Court of Appeals decision leaves unsettled long-standing uncertainties and conflicts respecting jurisdiction to review Commission orders.

Under the Court of Appeals decision, reviewability under Section 19(b) of the Act is governed by obscure technicalities respecting the *form* and *label* of Commission orders. This interpretation of Section 19(b) has resulted in traps for the unwary, *Public Service Comm. v. FPC*, 284 F. 2d 200 (D. C. Cir. 1960), and *Texaco Inc. v. FPC*, 290 F. 2d 149 (5th Cir. 1961),[14] and in a flood of litigation instituted by persons seeking to protect themselves against forfeiting judicial review because of erroneous determinations of the technical *form* of Commission orders. Persons subject to Commission orders should not be deprived of their right to judicial review because of failures to appreciate niceties of

[14]Compare the Commission reviewability argument in this case with the Commission reviewability arguments in *The Pure Oil Co. v. FPC*, 292 F. 2d 350 (7th Cir. 1961), *Sohio Petroleum Co. v. FPC*, 298 F. 2d 465 (10th Cir. 1961), and *Southwestern Electric Power Co. v. FPC*, 304 F. 2d 29 (5 Cir. 1962), *cert. den.* 371 U.S. 924.

the technical form of orders nor should the courts be flooded with litigation by persons seeking to protect themselves against inadvertent forfeitures of judicial review."

Under the "substantive effect" standard applied by this Court, Section 19(b) of the Act provides that reviewability is governed by the practical substantive effect of the order. The test of parties aggrieved and reviewability of orders in this case is whether Order No. 242 constitutes a final substantive decision that is controlling with respect to Petitioner's substantive rights under the Act. This is the test that was used by the Court in *Wisconsin v. FPC*, 303 F. 2d 380 (D.C., 1961) aff'd. *Wisconsin, et al. v. FPC, et al.*, 373 U.S. 294 (1963). There the Court of Appeals held that reviewability of the Commission Statement of General Policy No. 61-1 is governed by whether it sets the *final controlling standards governing Commission action upon producer rate filings* so as to constitute prejudgment and final judgment respecting rates that will be filed under Section 4 and certificate applications that will be filed under Section 7(c) of the Act.

This Court found that Statement of General Policy No. 61-1 constitutes (1) a decision to shift from the individual producer cost of service method to the area rate method of rate regulation and (2) action fixing interim area guideline rates. The opinion of this Court shows that review of the policy statement involves two issues: (1) the threshold issue, whether the Constitution and

---

"The Commission itself sometimes has difficulty determining the technical form of its orders. In support of its motion to dismiss in companion case *Pan American Petroleum Corp. v. FPC*, Case No. 6973 (App. 1a-18a), the Commission vigorously argued that the November 16, 1961, letter order before the Court did not constitute temporary authorization because no Section 7 authorization was needed with respect to the contract amendment and extension involved. By order issued April 12, 1963, in Docket No. G-10955, the Commission reversed itself and set such contract amendment for hearing under Section 7(c) of the Act. The Court of Appeals interpreted the Commission letter order as constituting a temporary authorization. By order issued under Section 7(c) of the Act on June 3, 1963, in Docket No. G-10955, the Commission amended Petitioner's permanent certificate to cover the new gas committed under the contract amendment.

the Act prohibit the shift to area rate regulation, and (2) whether the particular formula for area rate regulation and the particular area rates adopted violate the Constitution or the Act. Without Commission objection, the Court reviewed the general policy statement with respect to the threshold issue but held that review upon the second issue would await orders adopting a specific area rate regulatory formula and just and reasonable area rates governing producer sales. The Order No. 242 final decision to require summary rejection of flexible price changing clause contracts is obviously more conclusive and controlling upon Petitioner's immediate substantive rights than the Statement of General Policy No. 61-1 decision to shift to area rate regulation.

The "substantive effect test" of reviewability was explicitly adopted by Federal Power Commissioner Morgan in his concurring opinion in Order issued January 30, 1963, in *Amerada Petroleum Corp., et al.*, Docket Nos. CI62-1544, *et al.* Referring to Commission refusal to permit parties to rate proceedings to controvert the area prices, Commissioner Morgan stated, "If continued, such practices will fast convert our Policy Statement 'guidelines' to irrebuttable presumptions. For as the Supreme Court explained in a similar situation, holding an agency policy to be a reviewable act: 'The particular label placed upon [its action] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive.' *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407 (1942)."

What Order No. 242 does is a practical, relevant, and understandable basis for determining whether it is directly reviewable. *What the form of Order No. 242 is*, is an impractical, irrelevant, and obscure basis upon which to determine reviewability. The Court of Appeals decision that the "substantive effect test" of reviewability is not applicable to *direct* review of Order No. 242 results in unnecessary and harmful delays and confusion. It deprives reviewing courts of an adequate record for review of substantive regulations and results in forfeitures of substantive rights

by the parties to such regulations. Applications of the Commission argument sustained by the Court of Appeals have resulted in inadvertent forfeitures of judicial review and in burdening the courts with unnecessary litigation.

Elimination of these evils awaits decision by this Court that reviewability under Section 19(b) of the Act is governed by the "substantive effect test" as applied by this Court to determine parties aggrieved and reviewability of orders.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM J. GROVE
CARROLL L. GILLIAM
Dow, Lohnes and Albertson
600 Munsey Building
Washington 4, D. C.
Attorneys for Petitioner

Of Counsel:
W. W. HEARD
J. P. HAMMOND
Wm. H. EMERSON
P. O. Box 591
Tulsa, Oklahoma

August, 1963